

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP912
2015AP913
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2014CV1482
2014CV1483**

**IN COURT OF APPEALS
DISTRICT IV**

VILLAGE OF BLACK EARTH,

PLAINTIFF-APPELLANT,

V.

BLACK EARTH MEAT MARKET, LLC,

DEFENDANT-RESPONDENT.

APPEALS from judgments of the circuit court for Dane County:
WILLIAM E. HANRAHAN, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Village of Black Earth appeals the circuit court's grant of summary judgment in favor of Black Earth Meat Market, LLC, dismissing

ten citations issued by the Village against BE Meats for nuisance and traffic ordinance violations.

¶2 BE Meats argues that it is entitled to summary judgment because Wisconsin’s right to farm law, WIS. STAT. § 823.08 (2013-14), “precluded the Village from issuing the citations against BE Meats.”¹ The Village counters that the right to farm law does not apply here, because the “issuance of municipal citations seeking only monetary forfeitures was not a nuisance action under the right to farm law.” BE Meats also argues that it is entitled to summary judgment as to three of the citations relating to traffic ordinance violations because those citations involve vehicles that it does not own, have custody of, or have control over. The Village counters that there are issues of material fact as to the three traffic violations precluding summary judgment. As we explain below, we conclude that BE Meats is entitled to summary judgment as to citation #6 (Idling Unattended Vehicle), but is not entitled to summary judgment as to the other nine citations.² Therefore, we affirm as to citation #6, and we reverse and remand for further proceedings as to the other nine citations.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² We do not address other arguments raised by the parties, because our decision as to these two issues disposes of the appeal. See *Barrows v. American Family Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) (“An appellate court need not address every issue raised by the parties when one issue is dispositive.”). We note that one of those arguments, by the Village, is that summary judgment may not be appropriate for traffic forfeiture actions generally. We do not address that argument because it is undeveloped and is raised for the first time on appeal. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992); *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶10, 261 Wis. 2d 769, 661 N.W.2d 476.

BACKGROUND

¶3 BE Meats operates a slaughterhouse and retail meat market business in the Village. As part of that operation, BE Meats receives “routine delivery” of animals, which are transported to BE Meats by a third party. According to BE Meats, “[t]he animals are only present at BE Meats for a short period of time [and the] slaughterhouse does not have the capacity to house, feed or otherwise take care of live animals for any extended period of time.”

¶4 Between October 2013 and January 2014, the Village issued BE Meats ten citations for the following ordinance violations:

- Two citations (#3, #7) for violation of ordinance 190-1B(4) Obstructing Street on October 8, 2013 and November 4, 2013.
- Two citations (#5, #10) for violation of ordinance 190-2(I) Street Pollution on October 27, 2013 and January 3, 2014.
- Three citations (#1, #2, #4) for violation of ordinance 190-4(J) Harboring Noisy Animals or Fowl on October 1, 2013, October 8, 2013, and October 17, 2013.
- One citation (#6) for violation of ordinance 255-11(B) Idling Unattended Vehicle on October 31, 2013.

- Two citations (#8, #9) for violation of ordinance 236-5 Permitting Street Obstruction on November 5, 2013 and November 13, 2013.³

¶5 BE Meats pled not guilty to all ten citations. After a trial to the municipal court, during which the Village presented testimony from several witnesses and BE Meats called no witnesses, the municipal court held that BE Meats was guilty on all of the citations except two (#4, #8). Both parties appealed the municipal court's decision to the circuit court. BE Meats then filed a motion for summary judgment, which the circuit court granted, dismissing all of the citations. The Village now appeals.

DISCUSSION

¶6 There are two narrow issues on appeal. The first issue is whether BE Meats is entitled to summary judgment as to all ten of the citations on the basis that Wisconsin's right to farm law precludes the Village from issuing citations for BE Meats' alleged violations. As we explain below, the right to farm law concerns only nuisance actions to recover damages or to abate a public nuisance, and there is no such nuisance action here. Thus, BE Meats fails to establish a prima facie case for summary judgment on this basis.

¶7 The second issue is whether BE Meats is entitled to summary judgment as to three traffic ordinance citations (#6, #8, #9) on the basis that BE Meats did not own, have custody of, or have control over the vehicles involved in

³ The parties refer to each of the citations by number according to the citations' chronological order. For consistency, we refer to the citations using the same numbers in this opinion.

those citations. As we explain below, BE Meats is entitled to summary judgment as to citation #6, but is not entitled to summary judgment as to citations #8 and #9.

¶8 Therefore, we affirm as to citation #6, and we reverse and remand for further proceedings as to the other nine citations.

A. Standard of Review

¶9 Our review of a circuit court’s grant of summary judgment is de novo. *Chapman v. B.C. Ziegler and Co.*, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. We review a motion for summary judgment using the same methodology as the circuit court. *United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶12, 349 Wis. 2d 587, 836 N.W.2d 807. “To make a prima facie case for summary judgment, a moving defendant must show a defense that would defeat the plaintiff. If the moving party has made a prima facie case for summary judgment, the court must examine the affidavits and other proof of the opposing party to determine whether a genuine issue exists as to any material fact or whether reasonable conflicting inferences may be drawn from undisputed facts.” *Tews v. NHI, LLC*, 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860.

¶10 “Thus, a party is entitled to summary judgment if the undisputed facts require it, even though the parties may dispute some facts in the case that have no bearing on the proper summary-judgment analysis.” *Chapman*, 351 Wis. 2d 123, ¶2. “Finally, we search the [r]ecord to see if the evidentiary material that the parties set out in support or in opposition to summary judgment supports reasonable inferences that require the grant or denial of summary judgment, giving every reasonable inference to the party opposing summary judgment.” *Id.*

¶11 On summary judgment, the parties presented and the circuit court considered the testimony and other evidence offered at the municipal court trial along with affidavits submitted by BE Meats in support of the summary judgment motion. We do the same.

B. Municipality Police Powers Over Public Nuisances

¶12 “Municipalities in Wisconsin have no inherent powers. They are authorized, however, to regulate local affairs by the Wisconsin Constitution and by sec. 62.11(5), Stats.”⁴ *City of Madison v. Schultz*, 98 Wis. 2d 188, 195, 295 N.W.2d 798 (Ct. App. 1980) (citation omitted). Municipalities may “carry out its powers by license, regulation, ... *fine*, imprisonment, confiscation, and other necessary or convenient means.” WIS. STAT. § 62.11(5) (emphasis added).

⁴ Article XI, section 3 of the Wisconsin Constitution, known as the “Municipal Home Rule,” provides in pertinent part:

Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

WISCONSIN STAT. § 62.11(5), provides:

Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public

The Applicable Ordinances Here

¶13 Ordinance 190-1, titled “Public nuisances generally,” prohibits public nuisances and defines them as including: “a thing, act, occupation, condition or use of property which shall continue for such length of time as to ... [u]nlawfully and substantially interfere with, obstruct or tend to obstruct or render dangerous for passage any street ... or other public way or the use of public property.”

¶14 Ordinance 190-2 prohibits certain public health nuisances, including street pollution, which is defined as: “Any use of property which shall cause any nauseous or unwholesome liquid or substance to flow into or upon any street, gutter, alley, sidewalk or public place within the Village.”

¶15 Ordinance 190-4 specifies public nuisances that affect peace and safety, including noisy animals or fowl, which is defined as: “The keeping or harboring of any animal or fowl which by frequent or habitual howling, yelping, barking, crowing or making of other noises shall greatly annoy or disturb a neighborhood or any considerable number of persons within the Village.”

¶16 Ordinance 255-11, titled “Leaving keys in vehicle; parking vehicle with motor running,” prohibits the idling of an unattended vehicle:

Parking vehicles with motor running. No person shall park or leave standing any motor vehicle with the motor or refrigerator unit running for more than five minutes within 300 feet of any residence within the Village between the hours of 10:00 p.m. and 7:00 a.m.

¶17 Ordinance 236-5 prohibits obstruction and encroachments: “No person shall encroach upon or in any way obstruct or encumber any street, alley, sidewalk, public grounds or land dedicated to public use, or any part thereof, or

permit an encroachment or encumbrance to be placed or remain on any public way adjoining the premises of which the person is the owner or occupant”

C. Whether Wisconsin’s Right to Farm Law Applies Here

¶18 On appeal, BE Meats narrowly argues that Wisconsin’s right to farm law precludes the Village from issuing citations for BE Meats’ alleged violations of the ordinances.⁵

¶19 Resolution of this issue requires us to construe statutes and ordinances. “We apply rules of statutory interpretation to the interpretation of ordinances.” *Schwegel v. Milwaukee Cnty.*, 2015 WI 12, ¶22, 360 Wis. 2d 654, 859 N.W.2d 78. “‘The construction of a statute in relation to a given set of facts is a question of law.’ We decide questions of law without deference to the circuit court’s determination.” *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 472, 464 N.W.2d 654 (1991) (quoted source and citation omitted). We construe statutory language based on its common and ordinary meaning. *Id.* at 484. If the language is plain and unambiguous, our analysis stops there. *Kangas v. Perry*, 2000 WI App 234, ¶8, 239 Wis. 2d 392, 620 N.W.2d 429. In conducting this analysis, we read statutory language not in isolation but as it relates to the statute as a whole. *Id.* “[W]e look only to the plain language, purpose, context, and structure of the statutes.” *Gister v. American Family Mut. Ins. Co.*, 2012 WI 86, ¶9, 342 Wis. 2d 496, 818 N.W.2d 880.

⁵ BE Meats appears to have argued in the circuit court that the right to farm law precludes the issuance only of citations #1, #2, #3, #4, #5, #7, and #10. On appeal, BE Meats expands its argument to include citations #6, #8, and #9. Regardless, our opinion is the same.

¶20 We begin with Wisconsin’s right to farm law, which affords certain protections to an “agricultural use” or “agricultural practice.” *See* WIS. STAT. § 823.08(3). The dispute here concerns an alleged “agricultural use” only. “Agricultural use” is defined under WIS. STAT. § 91.01(2) to include the activity of “keeping livestock” for the purpose of producing an income or livelihood. The phrase “keeping livestock” is not further defined in the statute, and the parties dispute whether BE Meats’ activity qualifies as “keeping livestock” under the statute. But we need not decide that issue because BE Meats’ argument fails for another reason.⁶ As we proceed to explain, the right to farm law concerns only nuisance actions to recover damages or abate a public nuisance and, here, the Village sought only to enforce its ordinances and impose forfeitures. In short, the right to farm law does not protect BE Meats against the Village’s forfeiture actions.

¶21 Wisconsin’s right to farm law, WIS. STAT. § 823.08, appears in WIS. STAT. ch. 823. Relevant here, ch. 823 authorizes villages to maintain actions “to *recover damages* or to *abate* a public nuisance.” WIS. STAT. § 823.01 (emphasis added). This authority is then limited in § 823.08(3)(a). That subsection, in broad strokes, limits actions targeting an “agricultural use” or an “agricultural practice” *and* seeking damages or abatement based on whether two factors are present. In

⁶ Although we do not decide this issue, we question whether BE Meats’ temporary holding of animals for a brief period of time prior to their killing constitutes “keeping livestock.” *See generally* WIS. ADMIN. CODE § ATCP 17.01(22) (defining “keep livestock” to mean “to own, feed, house, confine, or care for livestock, or to exercise legal or physical control over livestock,” not including “the quarantine or confinement of livestock by the department [of agriculture, trade, and consumer protection] or by the United States department of agriculture”). We note that here, an employee of BE Meats averred that the property does not have “any facilities for the feeding, sleeping, grooming, etc., of animals” and that for the “vast majority of the day and night there are no live animals on the property.”

other words, the right to farm law protects “agricultural use[s]” and “agricultural practice[s]” from actions for damages or abatement. Nothing more. Nothing in the right to farm law strips municipalities of any authority they may have to impose forfeitures, including authority they may have to regulate an agricultural use pursuant to their police powers.

¶22 In this case, the Village did not bring a nuisance action against BE Meats to recover damages or to abate a public nuisance. Rather, the Village issued forfeiture citations for ordinance violations pertaining to noisy animals, street obstruction, street pollution, and an idling vehicle. BE Meats then challenged those citations in municipal court. Thus, at no point was there any nuisance action to recover damages or to abate a public nuisance so as to invoke the limited protections under the right to farm law. To the extent that BE Meats argues that an action for forfeiture, where the remedy sought is a monetary forfeiture for an ordinance violation, amounts to a nuisance action to abate or to enjoin a public nuisance because it has some indirect effect of abating such nuisance, we reject that argument as unpersuasive and not supported by any legal authority.⁷

⁷ Generally, a “suit for an injunctive order differs from an action to recover a forfeiture in that an action for injunctive relief before a court of competent jurisdiction is an action in equity as opposed to a forfeiture action, which is a statutory action at law.” *Columbia Cnty. v. Bylewski*, 94 Wis. 2d 153, 162-63, 288 N.W.2d 129 (1980). An action to recover a forfeiture and a suit seeking injunctive relief are fundamentally different in nature:

In an ordinance violation, the municipality need only introduce the ordinance, and establish by a preponderance of the evidence, facts sufficient to demonstrate that the defendant has violated such ordinance before the court imposes a forfeiture. While, on the other hand, a suit for an injunctive order is addressed to the discretion of the court and requires that there be a balancing of the competing equities and interests involved.

Id. at 167.

¶23 In sum, BE Meats fails to establish a prima facie case for summary judgment on the basis that Wisconsin’s right to farm law precludes the issuance of citations for BE Meats’ alleged ordinance violations because, here, the right to farm law did not apply where the Village did not bring any nuisance action against BE Meats to recover damages or to abate a public nuisance.

D. Traffic Citations #6, #8, and #9

¶24 BE Meats argues that it is entitled to summary judgment for three traffic ordinance citations (#6, #8, #9) on the basis that it did not own, have custody of, or have control over the vehicles involved in those citations. As we proceed to explain, we conclude that there is no issue of material fact as to citation #6, but that there are issues of material fact as to citations #8 and #9. Therefore, BE Meats is entitled to summary judgment as to citation #6, but is not entitled to summary judgment as to citations #8 and #9.

1. Citation #6: Idling Unattended Vehicle

¶25 As we have noted, citation #6 is for violation of ordinance 255-11(B) Idling Unattended Vehicle on October 31, 2013 at 5:45 a.m. Ordinance 255-11, titled “Leaving keys in vehicle; parking vehicle with motor running,” prohibits the idling of an unattended vehicle:

Parking vehicles with motor running. No person shall park or leave standing any motor vehicle with the motor or refrigerator unit running for more than five minutes within 300 feet of any residence within the Village between the hours of 10:00 p.m. and 7:00 a.m.

Nothing in the plain language of the ordinance limits liability to owners or drivers of the vehicle. Rather, the ordinance holds liable any “person” who “park[s] or

leave[s]” the vehicle idling. In order for a person to “park” or “leave” a vehicle idling, the person certainly must exhibit some level of control over the vehicle.

¶26 In support of this citation, the Village presented testimony in the municipal court from two neighbor witnesses. The first witness testified that she saw the vehicle parked, unattended, and idling for about fifteen minutes near BE Meats at about 5:30 a.m. on October 31, 2013. She further testified that she later saw the vehicle loading BE Meats product at about 7:50 a.m. The second witness testified that he was awoken by the sounds from the idling vehicle at about 4:05 a.m. on October 31, 2013. He further testified that the vehicle idled for about twenty or twenty-five minutes before driving away.

¶27 On summary judgment, BE Meats presented an affidavit by its operations manager, who averred that BE Meats has a sign on the front door of the facility stating, as follows:

Truckers and Haulers

Absolutely NO DELIVERIES before 7:00 am

Move your Truck until 7:01 am

NO PARKING, WAITING IN LINE. WHEN YOU SIGN
IN LEAVE YOUR CELL #

DO NOT PARK AND LEAVE YOUR TRUCK IDLING
IN THE NEIGHBORHOOD, ON THE SURROUNDING
STREETS

The Village will be citing you according to Ordinance
255.10 and 255.14

The operations manager further averred that on October 31, 2013, he arrived at BE Meats at 5:50 a.m., after the citation for idling an unattended vehicle had been issued, and that he saw the idling truck and immediately told the driver to move his vehicle until the BE Meats facility opens at 7:00 a.m.

¶28 In the absence of other evidence, we conclude that the only reasonable inference from the evidence submitted is that BE Meats did not have sufficient control over the vehicle's early arrival to the facility such that BE Meats could be found to have parked or left the vehicle idling in violation of the ordinance.

2. Citations #8 and #9: Permitting Street Obstruction

¶29 Citations #8 and #9 are for violations of ordinance 236-5 Permitting Street Obstruction on November 5, 2013 and November 13, 2013 respectively. Ordinance 236-5 prohibits obstruction and encroachments:

No person shall encroach upon or in any way obstruct or encumber any street, alley, sidewalk, public grounds or land dedicated to public use, or any part thereof, or *permit an encroachment or encumbrance* to be placed or remain on any public way adjoining the premises of which the person is the owner or occupant”

(Emphasis added.)

¶30 As to the November 5, 2013 violation, the Village presented testimony from a neighbor witness. That witness testified that around 9:00 a.m. that day, she saw two vehicles parked and idling in front of BE Meats' property, and that one of the vehicles was blocking the street such that other vehicles could not go through the street. She further testified that the vehicles were in the process of unloading to BE Meats.

¶31 As to the November 13, 2013 violation, the Village presented testimony from the deputy who issued the citation. The deputy testified that he saw an unattended truck and trailer “[p]arked against traffic, partially blocking the traffic that would be on the north side” of the street adjacent to BE Meats' property. Specifically, the truck and trailer were “blocking half of the roadway”

such that “all of the westbound traffic ... would not be able to get through.” According to the deputy, the driver eventually “came out of Black Earth Meats.”

¶32 BE Meats presented no evidence refuting any of the above testimony. Rather, BE Meats’ operations manager averred that the general process during deliveries was that a BE Meats employee would “instruct” the farmer or trucking company “where to place his or her vehicle to unload the animals.” Thus, a reasonable inference from the evidence is that on November 5, 2013 and on November 13, 2013, BE Meats permitted the vehicles to “be placed or remain” on the public street adjoining BE Meats’ property, causing an obstruction in violation of ordinance 236-5. Accordingly, BE Meats fails to demonstrate that it is entitled to summary judgment as to citations #8 and #9.

¶33 In sum, BE Meats is entitled to summary judgment as to citation #6 for violation of ordinance 255-11(B), because it cannot be reasonably inferred that BE Meats parked or left the idling vehicle. However, BE Meats is not entitled to summary judgment as to citations #8 and #9 for violations of ordinance 236-5, because it can be reasonably inferred from the evidence that BE Meats permitted the vehicles identified in those citations to obstruct the public street adjacent to its property.

CONCLUSION

¶34 For the reasons set forth above, we conclude that BE Meats is entitled to summary judgment as to citation #6, but is not entitled to summary judgment as to the other nine citations. Therefore, we affirm as to citation #6, and we reverse and remand for further proceedings as to the other nine citations.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

